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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

BERKEY PHOTO, INC.,

Petitioner,

against

EASTMAN KODAK COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALVIN M. STEIN
530 Fifth Avenue
New York, New York 10036
Attorney for Petitioner

Of Counsel:
BARRY J. BRETT
MARK I. SCHLESINGER
AURORA CASSIRER
MARK D. OFFEN
PARKER CHAPIN FLATTAU & KLIMPL
NEUMAN, WILLIAMS, ANDERSON & OLSON

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IN THE

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EASTMAN KODAK COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Berkey Photo, Inc. ("Berkey"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered on June 25, 1979 by the United States Court of Appeals for th Second Circuit in this cause.

Opinions Below

The opinion of the Court of Appeals is unofficially reported at 1979-1 Trade Cas. ¶ 62,718. The memorandum on post-trial motions of the District Court, Judge Marvin E. Frankel, dated June 16, 1978 and his opinion denying Eastman Kodak Company's ("Kodak") motion for a new trial dated August 8, 1978 are reported at 457 F. Supp. 404. These three opinions are reprinted in the separate appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals, reprinted in the separate appendix, was entered on June 25, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The pertinent portions of these statutes are reprinted in the separate appendix to this petition.

Questions Presented

As the Court of Appeals observed, this case is "one of the largest and most significant private antitrust suits in history" (5a).[1] Its opinion purported to decide "important and novel issues concerning § 2 of the Sherman Act" (7a), noted that "[f]ew, if any cases have presented so many diverse and difficult problems of § 2 analysis" (14a), rejected *"Alcoa"*[2] in significant part (18a-20a) and reached results admittedly not supported by precedent (*e.g.*, 40a, 71a-73a). Verdicts of the jury (demanded by Kodak)—which the trial court endorsed—based on the stream of evidence and arguments adduced during an eight-month

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[1] "—— a" citations are to the separate appendix submitted herewith. "A ——" citations are to the parts of the record printed in the Joint Appendix to the Second Circuit. "E ——" citations are to exhibits printed in the Joint Appendix to the Second Circuit; "C ——" citations are to certain confidential exhibits printed in said appendix.

[2] *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

trial, were set aside by the Court of Appeals, which: (i) created enclaves of immunity from § 2 scrutiny for willfully exclusionary conduct, including the "leveraging" of monopoly power by "integrated" monopolists; (ii) substituted its view of the facts, assessed out of context, for the well-supported jury findings; (iii) promulgated an unprecedented rule for direct purchaser recovery of monopoly overcharges, which conflicts with the substantive basis for recovery and imposes requirements of proof which this Court has explicitly stated cannot be met and should not be attempted; and (iv) otherwise acted in conflict with important established principles of antitrust law. The questions presented are:

1. Should deliberately exclusionary conduct, including the leveraging of monopoly power into several relevant markets, be deemed *per se* lawful under § 2 of the Sherman Act because it was undertaken by a single vendor and was associated with product introduction?

2. May a jury be permitted to consider, in a § 2 case, a monopolist's rejection of less exclusionary courses of conduct, such as informing camera makers of an arbitrarily chosen film format,[3] prior to its introduction, where such timely disclosure would have involved no technological secrets about film or any information whatever about cameras and was solely a means of ameliorating the effects in the camera market of other deliberately exclusionary conduct?

3. Was it consistent with the Seventh Amendment and § 2 of the Sherman Act for the Court of Appeals to (a) substitute its view of the facts for the well supported find-

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[3] "Format" refers to the dimensions of the film strip and the cartridge in which it is contained. Cameras, almost without exception, are designed to use only one format. Illustratively, a 126 film format cannot be used in a 110 camera or vice versa (A 2622).

ings of the jury, concurred in by the trial judge, (b) ignore the market structure and the context, purpose and effect of the monopolist's conduct, and (c) determine that a persistent monopolist in the amateur camera market had not violated § 2, even though the record as a whole established and the jury found that its monopoly power was due to the intentional employment of exclusionary conduct, including violations of § 1 and leveraging of monopoly power in the film market to gain competitive advantages in the camera market?

4. Where persistent monopolization in violation of Section 2 of the Sherman Act has been found, may a direct purchaser of overpriced products recover damages measured by the difference between the monopolist's price and the price which would have prevailed in the absence of monopoly power found to have been unlawful, or is recovery limited, as the Court of Appeals ruled, to such "price increment" as can be shown to have been caused by "anticompetitive conduct that originated or augmented the monopolist's control over the market"?

5. Should the jury's verdicts have been sustained with respect to Berkey's photofinishing and photofinishing equipment damages and reinstated with respect to Berkey's 1971 camera losses, where the Court of Appeals recognized that there was sufficient evidence to support each such verdict, and referred to no error which affected the award?

Statement of the Case

A. Preliminary Statement

No issue is presented as to market definition or as to Kodak's monopoly power in the conventional (*i.e.*, non-instant) film, paper and camera markets here found to have been monopolized (17a-18a). Kodak's uniquely persistent and enormous market shares and profits in the

monopolized markets, reflective of monopolization, are summarized in Tables 1, 2 and 3 (pp. a1, a2, a3 hereof). These monopolies were illegally acquired and maintained and not "thrust upon"[4] Kodak, "economically inevitable"[5] or "a consequence of superior product, business acumen or historic accident."[6]

The jury found (182a-83a) that Kodak used its persistent power and approximately 90% market share in film,[7] in activities, including those associated with product introductions, to leverage its position and exclude competition in the camera and other markets.

Berkey was injured: (i) as a camera manufacturer, by the loss of sales and profits caused by Kodak's monopolization and attempted monopolization of that market, Kodak's use of its film monopoly to injure and destroy camera competition, and Kodak's violations of § 1 of the Sherman Act; (ii) as a photofinisher, by the loss of sales and profits and by overpaying Kodak for photofinishing equipment as a consequence of Kodak's misuse of its film monopoly; and (iii) as a direct purchaser of film and paper from Kodak,[8] by paying prices vastly in excess of those which would have prevailed in the absence of Kodak's unlawful monopolization of these markets.

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[4] *Alcoa, supra* at 429.

[5] *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 344 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The trial court expressly observed that Kodak's camera monopoly "was a world away from being 'economically inevitable'" (111a).

[6] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[7] The market where its return on investment has generally ranged at the extraordinarily high 60%-70% level (see *infra*, p. a2).

[8] From 1969 to 1977, Berkey purchased $75,324,000 of film and $46,029,000 of color paper from Kodak (E 2490, 2479).

Kodak's principal effort at exculpation with respect to the claims based on leveraging, associated with product introduction, was its argument that:

> "[A] company's introduction of a new product—though the company be a huge one like Kodak with monopoly power in a mosaic of interconnected markets, and though the introduction be designed deliberately to employ monopoly power in one market to create or enhance such power in another—must 'as a matter of law' be immune from attack under the antitrust laws." (105a).[9]

District Judge Frankel rejected such "formalistic line drawing" in favor of weighing "'all of the circumstances of a case' to determine whether a company has engaged in unlawfully anticompetitive practices. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)," and observed:

> "The court remains persuaded, however, that there is no such enclave for 'product introduction,' and that the mode, purpose, and impact of product introductions may, as in this case, play central parts in findings of unlawful monopolization and attempts to monopolize, no less than other, ordinarily lawful and 'normal' business activities like leasing rather than selling machinery, *United States* v. *United Shoe Machinery Co.*, 110 F.Supp. 295, 344 (D.Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), the creation of useful resources for added productive capacity, *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430-31 (2d Cir. 1945), or the discount offered on used equipment

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[9] See also A 1045-47, 1679, 1691, 1693-94, where Kodak argued for such a rule of *per se* lawfulness in connection with requests to charge and motions to dismiss, while refusing the invitation by the District Judge to propose any less extreme rule or standard by which its conduct could be tested.

and the adoption of separate charges for separate services condemned as exclusionary in *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 499-503 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (1978)." (105a).

The Court of Appeals, disregarding proof and findings as to the purpose and effect of Kodak's activities in the relevant context or market structure, in essence attributed *per se* validity to Kodak's leveraging, on the grounds that it merely represented one of the permissible competitive advantages of a multiproduct firm which the Court referred to as "an integrated business" (25a). Accordingly, it set aside the § 2 camera award to Berkey in the amount of $15,250,000 and dismissed the claims that Kodak monopolized and attempted to monopolize the camera market. The jury verdicts, predicated upon the claims that Kodak used its film monopoly to leverage its photofinishing and photofinishing equipment businesses, were also set aside.

Without questioning the evidentiary or legal sufficiency of the jury verdicts that Kodak unlawfully secured or maintained its monopolies in the film and paper markets, the Court of Appeals set aside Berkey's award for film and paper overcharges and remanded the claims for a new trial with respect to liability and damages. This determination was based on the Court's view that the jury was improperly permitted to award damages for overcharges measured by the difference between the prices actually charged and the prices which would have prevailed in the absence of unlawful monopolization. Instead, the Court enunciated the unprecedented rule that recovery for monopolistic overpricing is limited to a "price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market" (71a). It thus rejected a measure of damages based on Kodak's power to fix prices without regard to the influence of competition, which resulted from monopolization in vio-

lation of § 2. It mandated, instead, inquiry as to the impact of particular acts on pricing action, in a manner which this Court has heretofore observed cannot be done and should not be attempted (see *infra*, pp. 32-33).

B. Kodak's Persistent Domination and Manipulation of Amateur Photography

Kodak's present monopoly power, as its economist acknowledged at trial, cannot be divorced from its pattern of acquisition and destruction of competitors, tie-ins, refusals to deal, conspiracies in restraint of trade and other exclusionary conduct virtually eliminating competition[10] (E 1269-74, 1121-39; A 1748-49). Prior to 1954, when a consent decree in a government-instituted action[11] ended these and other practices, Kodak tied processing to color film sales and refused to sell monopolized color paper to others. This foreclosed entry by photofinishers and color film and paper manufacturers.

Kodak has at all times maintained its overwhelming dominance of the film and color paper markets so that photofinishers have been confined to equipment and procedures needed to process Kodak film and paper. Since ready access to photofinishing is essential to the convenient use of film (A 749-52, 787-90), only film "compatible" with Kodak film (i.e., film in the same format and capable of being processed with Kodak film) can be marketed successfully. Similarly, color papers of other manufacturers must be Kodak "compatible" (A 773-76, 1614-20).

A camera is useless without film which can be exposed in that camera, and then developed and printed. Since all manufacturers of film other than Kodak share only about

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[10] Certain of this conduct occurred prior to 1915 and was then adjudicated to be unlawful. *United States* v. *Eastman Kodak Co.*, 226 F. 62 (W.D.N.Y. 1915), *appeal dismissed*, 255 U.S. 578 (1921).

[11] *United States* v. *Eastman Kodak Co.*, 1954 Trade Cas. ¶ 67,920 (W.D.N.Y. 1954).

10 percent of the film market (p. a2, *infra*), Kodak alone can provide the wide availability of film needed to successfully market cameras using a distinct film format. The powerful brand differentiation in film associated with the Kodak name and monopolistic presence in the market further prevents the successful marketing of cameras for which Kodak film is not available. Aware of all of the foregoing, Kodak has consistently refused to make its film available for innovative cameras of others, with the explicit purpose of inhibiting the sale of non-Kodak cameras (A 964-65, 969-73, 1014; E 1813, 2162). As even the Court of Appeals (41a) and Kodak's economist (A 1740-41) conceded, Kodak has thereby prevented the successful introduction of any new camera format by any other camera maker.

C. Violations in the Camera Market

1. Proceedings in the District Court

a. Conspiracies in Violation of Section 1 of the Sherman Act

Kodak used its market dominance to extract from Sylvania and G.E. exclusive secret information, patent rights, promotional and marketing advantages and price preferences with respect to camera related flash lighting devices invented by these lamp companies. Kodak also conspired with Sylvania and G.E. to time the introduction of such lighting devices and, on occasion, to delay introduction, to correspond with Kodak marketing plans. It compelled the lamp companies, contrary to their explicit desires, to withhold from other camera manufacturers information which would have enabled them to compete on the merits with respect to cameras capable of cooperating with the flash inventions of Sylvania and G.E. As a result, when Sylvania introduced its flashcube in 1963, and its magicube in 1970, and G.E. introduced its flipflash in 1975, Kodak alone was in a position to offer cameras using these devices, while all other camera manufacturers were left with inventories

of obsoleted cameras and the need to hastily and inefficiently proceed with the design of cameras for the new flash lamps.[12] (123a-24a).

The jury determined that Kodak had conspired with Sylvania and G.E. in violation of § 1 of the Sherman Act (187a) and awarded damages, stated separately for 1970 and 1971 with respect to the magicube conspiracy (188a). Damages related to the Kodak-G.E. flipflash conspiracy were not separately determined.

In ruling on Kodak's post-trial motions, the District Judge described the Kodak-Sylvania conspiracy as "a restraint to be denounced under the rule of reason, and a form of exclusionary conduct supporting the findings of liability under Section 2" (123a). Judge Frankel upheld the 1970 damages, but set aside the 1971 damages because of the method of quantification (125a-26a).

b. Monopolization in Violation of Section 2 of the Sherman Act

Having succeeded, by anticompetitive means, in inhibiting the successful introduction by others of small pocketable cameras (*supra*, pp. 8-9), in March 1972, Kodak introduced the 110 system, consisting of (i) a small film format intended to obsolete existing industry standards; (ii) a new film, Kodacolor II, offered only in the 110 format;[13] (iii) a new system of photofinishing equipment and materials (available only from Kodak) required by the 110 format and associated Kodacolor II; and (iv) 110 format

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[12] Flashcube, magicube and flipflash were the only meaningful amateur conventional still camera flash introductions after the 1950's except for Everflash introduced by Berkey's Keystone division in 1970.

[13] Judge Frankel observed that the record supports a jury finding that Kodacolor II was confined to the 110 format for "anticompetitive purpose alone, not because of any technological or legitimately commercial concerns." (113a)

cameras which alone were able to use the new film or film format.

Kodak recognized that the 110 camera was merely one of many "cute little cameras . . . on the market," that "[t]here is nothing terribly novel about a new one, especially when it was bigger than most of the others" (E 1817) and that "[without] a new film, the program is not a new advertisable system" (E 1803). Accordingly, it launched the 110 system with a new film which it knew to be unnecessary and defective (E 830-33, 1766, 2109-10, 2082; A 1209-10) but nevertheless falsely promoted as a "remarkable new film" and the best film Kodak ever manufactured (E 2587-89, 2706-09; A 640).

As intended by Kodak, the 110 system sounded the "death knell" of existing camera formats (A 953; E 1519) and—despite Kodak's "lawyers worries about systems selling"—Kodak gained a "hammerlock" on the 110 system because "the new cartridge will fit only into our cameras" (E 2232).[14]

Responsible Kodak executives proposed that competing camera makers be informed of the configuration of the 110 film format prior to its introduction. Such disclosure would have preserved to Kodak its enormous film making profits, but would have ameliorated the anticompetitive effects in the camera market. Such "predisclosure" would *not* have included any information about Kodak camera plans or design or film technology, but would have been

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[14] The purposeful exclusionary nature of such systems selling was lucidly expressed in an August 1970 internal memorandum to Kodak's current chief executive officer from the coordinator of the 110 program, stating in material part as follows:

> "Kodak wants to sell a system, designs their products to fit into a system, and encourages their customers to think of photography as a system that Eastman Kodak Company is offering. Any marketing strategy which allows other manufacturers to introduce their products into this system context —particularly to serve large segments of the market—is a loss to the Eastman Kodak Company." (E 1307)

limited to information necessary for other manufacturers to independently design and manufacture cameras to be used with the new film format.[15] Kodak rejected such limited predisclosure in order to use its monopoly in the film market to deny other camera makers reasonable opportunity to compete on the merits with Kodak cameras.[16]

In upholding the jury's verdicts that Kodak monopolized and attempted to monopolize the camera market, the District Judge wrote, with respect to the foregoing events, that:

> "The paramount strategy and goal were thus to use the film monopoly . . . as a lever for suddenly swelling defendant's power in the camera market . . ." (104a).
>
> * * *
>
> ". . . the evidence tended powerfully to support plaintiff's theory of unlawful 'leveraging'. It is unnecessary to speculate whether plaintiff might have been entitled to a directed verdict on this score. It is sufficient to say that the evidence showed a carefully orchestrated program by defendant to use its film monopoly so as to obstruct and frustrate competition on the merits in the camera market" (109a).

Judge Frankel also concluded that it was appropriate to permit the jury to consider "predisclosure," and noted: (i) the sharply limited significance given to the matter in the

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[15] Belatedly, in January 1972, after a camera competitor threatened antitrust litigation, Kodak sold such limited information to camera makers (A 34-37).

[16] In a 1974 settlement of an antitrust action, Kodak again agreed to provide the limited disclosure here contemplated (E 2387-2407). Such information had previously been provided by Kodak in connection with the Super 8 movie format introduction in 1965 (A 974-77; E 920-23).

development of the case and in his charge;[17] (ii) the cautionary surrounding instructions, including a statement of the usual right to keep products secret; (iii) the context of facts which permitted the jury to "have found the 110 introduction a scheme contrived almost wholly to crush competitors;" and (iv) that the Sherman Act and the precedents required "a frequently subtle, inevitably comprehensive appraisal of actions by a company like Kodak wielding enormous monopoly power" (112a-115a).

2. Opinion of the Court of Appeals

The Court of Appeals affirmed the findings of § 1 violations (87a). The award of damages for 1970 was allowed to stand. The Court of Appeals found that the measure of damages used for 1971 was appropriate and reversed the District Judge's action in setting aside the 1971 damage award. However, instead of reinstating the jury's verdict, the Court of Appeals remanded for a new trial on damages. A new trial was also ordered to separately compute the damages resulting from the 1975 Kodak-G.E. flipflash conspiracy (101a).

The Court of Appeals reversed the § 2 findings, set aside the $15,250,000 awarded to Berkey for lost camera profits following the March 1972 110 system introduction and dismissed the § 2 camera claims.[18] Significantly, however, with the exception of a single reference to predisclosure in the charge on liability, the Court rejected all of Kodak's challenges to the relevant portions of Judge Frankel's charges to the jury (98a n. 72).

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[17] See A 265-66 as to the pertinent portions of the charge with respect to predisclosure.

[18] A new trial was not ordered with respect to the § 2 camera claims, as in the case of film and paper, even though the trial court precluded Berkey's reliance upon pre-1969 origins of the camera monopoly, which the appellate court, in discussing the film and paper monopolies, said was error (75a-76a).

The Court held that it was reversible error to allow the jury to consider the absence of predisclosure (37a-38a). The opinion failed to reflect the non-technical nature of predisclosure[19] and the limiting charge on the matter (see *supra*, pp. 11-13).

The Court characterized the exclusionary effects in the camera market of the simultaneous introduction of the 110 format, Kodacolor II in only the 110 size and the Kodak 110 cameras merely as "competitive advantages" flowing from the "broad based activities" of "any integrated firm" (25a). It erroneously assumed, despite clear and uncontroverted proof to the contrary, that any other film maker could have successfully introduced a new film format and cooperating line of cameras (40a)[20] and that 110 was primarily a camera development (41a).[21] It concluded that such activities could not constitute the use of monopoly power, but were solely the "benefit of integration" (40a) which in its novel view, as a matter of law, were immune from § 2 scrutiny. Its opinion does not mention the unequivocal factual findings by the jury and Judge Frankel (182a-183a, 105a-112a) that Kodak had used its monopoly power in film to gain competitive advantages in cameras. Although the Court of Appeals did note that Kodak, by refusing to make film available, had unlawfully prevented other camera manufacturers from competing by intro-

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[19] At certain points in its opinion (34a, 38a) the Court of Appeals recognized that the predisclosure here in issue was limited to information as to the 110 film format necessary to permit other camera manufacturers to independently design cameras to cooperate with film in this format. However, elsewhere the opinion ignores this limitation (35a, 36a), and at one point, erroneously and completely without support in the record, appears to assume that the disclosure contemplated details of Kodak's camera design which would enable others to copy Kodak cameras (31a).

[20] But see pp. 8-9, *supra*.

[21] But see p. 11, *supra*.

ducing cameras using new small formats, it viewed that anticompetitive conduct as irrelevant (41a-43a). Similarly treated as totally discrete conduct are the next described practices which the Court of Appeals recognized to be exclusionary and which were inextricably intertwined with the 110 scheme.

While the Court of Appeals recognized that the jury could readily have found that rushing the defective Kodacolor II film to market was an intentional and effective act of leveraging the monopoly power in film without any technological justification (46a-47a), it concluded that (a) there was no showing that the new film "coerced" purchases of 110 cameras and (b) it was not improper for Kodak to falsely promote the new film in order to enhance its camera sales (49a-51a).

The Court also acknowledged that Kodak may have violated § 2 by bringing out the allegedly superior and heavily promoted film in only the 110 format to leverage Kodak camera market dominance (51-52a). However, it reasoned that, since Berkey had not further extended this trial by locating and bringing in some undefined numbers of the "millions of amateur photographers" who bought the Kodak 110 camera in preference to a Berkey camera, in order to establish which of them acted solely as a result of the limitation of Kodacolor II to 110 film (54a), the jury could not have found injury due to that act alone (54a)—even though the Court of Appeals conceded that Kodak may have sold more 110 cameras by using and falsely promoting Kodacolor II in the 110 system (47a).[22]

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[22] Significantly, the Court raised no doubt as to the adequacy of proof of the fact of Berkey's injuries in considering the other aspects of Kodak's camera related conduct. See also the trial judge's observation that the proof of injury may well have merited a directed plaintiff's verdict (A 1671-72). Moreover, a requirement of such subjective proof of injury based on the views of

(footnote continued on following page)

The Court of Appeals repeatedly substituted its own view of the facts for the jury's well-supported findings and otherwise failed to weigh and consider in context: (i) the interrelationship among the above-considered aspects of the 110 program to which it specifically referred, and their relationship to other relevant acts and circumstances evidencing exclusionary purpose or effect; (ii) the proven anticompetitive intent and effect of Kodak's conduct; (iii) the nature and structure of the markets involved; (iv) the persistence of Kodak's monopoly in the camera market and the extent to which its domination of that market derived from its monopoly in the film market; (v) the significance of other exclusionary conduct, including the proven § 1 violations, which helps explain the origins of Kodak's camera market monopoly; and (vi) the lack of persuasive evidence that the camera monopoly was due to innovation or superior business acumen.

D. Section 2 Violations in the Photofinishing and Photofinishing Equipment Markets

The photofinishing of Kodacolor II in the 110 format required radically different processing equipment, materials and procedures from those of its predecessors. For a limited time after introduction, Kodak alone could offer processing for Kodacolor II or 110. Independent photo-

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(footnote continued from preceding page)

millions of individuals is wholly inconsistent with abundant controlling authorities. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 121 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 377 (1927); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709 (9th Cir.), *cert. denied*, 361 U.S. 961 (1959); *William H. Rankin Co.* v. *Associated Bill Posters of United States and Canada*, 42 F.2d 152 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930).

finishers such as Berkey could enter the field only by purchasing overpriced and inefficient equipment and materials from Kodak. The jury explicitly found that Kodak had used its film monopoly to gain competitive advantage in the photofinishing and photofinishing equipment markets (183a). The trial judge referred to "unquestionably sufficient evidence, that defendant had used its film monopoly . . . to injure plaintiff as a photofinisher" (120a). He upheld damage awards for Berkey's lost profits as a photofinisher in the amount of $55,700 and for overcharges on the equipment in the amount of $19,000 and awarded equitable relief (144a-47a, 138a-40a; A 571-73).

The Court of Appeals recognized that Kodak had engaged in "shoddy treatment" (58a) of independent photofinishers and thereby gained competitive advantage, but held this not to be cognizable under the Sherman Act. It further observed that the evidence may have supported the jury's finding of leveraging in violation of § 2 (60a).[23] However, cryptically concluding that the instructions to the jury did not "draw with sufficient sharpness the distinction between exercises of power and the natural benefits of size and integration" (61a), it set aside the jury's verdicts and remanded the matters for a new trial.[24] The Court's determination did not depend on any denied request to charge or denied request for a special finding.

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[23] There is a manifest inconsistency between this observation and the Court's rulings that the jury erred in concluding that the Kodak film monopoly was used to leverage its position in the camera market and that the advantages that Kodak derived in the camera market from its film monopoly were "solely a benefit of integration" and therefore, *per se* lawful (*supra*, pp. 6-7, 14).

[24] A purported ambiguity in the instructions, just as any other claimed error in instructing the jury, can support a reversal only if specifically objected to below. *Griggs* v. *Firestone Tire & Rubber Co.*, 513 F.2d 851, 857 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Little* v. *Green*, 428 F.2d 1061, 1069-70 (5th Cir.), *cert. denied*, 400 U.S. 964 (1970).

E. Kodak's Monopolization of the Film and Paper Markets in Violation of Section 2 of the Sherman Act

1. Proceedings in the District Court

Berkey, as a direct purchaser of film and color paper from Kodak, proved the extent of Kodak's monopolistic overpricing by demonstrating what the pricing would have been in the absence of monopoly power found to have been unlawful.[25] Consistent with Kodak's position (A 1795) that the film pricing of others was the best point of reference for measuring overcharges,[26] the only theory of film damages which was permitted to go before the jury was based on all available proof of film sales and pricing by others. Analogous data were presented as to color paper and this was supplemented by a showing of Kodak's own price cuts in the face of incipient competition. Extensive evidence and argument were presented by Kodak to explain its price premium. The jury was instructed that it could award damages only to the extent that Kodak's higher prices were attributable to its unlawful monopolization (A 458-64), and that no damages were to be awarded to the extent that any price premium for Kodak film or paper "was in whole or in part accounted for by circumstances and conduct on Kodak's part that were lawful and permissible—such factors as higher quality, better marketing methods, superior service, customer preference, and other elements urged by the defendant" (A 461, 464).

The District Judge upheld the jury award of $11,500,000 in damages for excessive prices paid for film. He found,

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[25] Kodak's counsel conceded that "the film market . . . has been a market where there has not been price competition and where Kodak has been able to price its products pretty much without regard to the products of competitors" (11a).

[26] In view of the fact that Kodak has at all times since at least 1915 enjoyed monopoly share and power in the film market (E 1554, 1643), it was impossible to refer to actual experience of Kodak film pricing in a competitive climate.

however, that there was insufficient evidence of anticompetitive conduct during the limitations period to uphold the color paper award (138a). Accordingly, the paper award in the amount of $8,803,000 was set aside.

2. Opinion of the Court of Appeals

Recognizing "a dearth of cases on point", the Court of Appeals held that the measure of damages applied by this jury was erroneous, and that the proper measure of damages "is the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market" (71a). The Court of Appeals acknowledged that the rule of damages which it enunciated —and which we respectfully submit is substantively inappropriate and procedurally unworkable (see Point IV, *infra*)—was novel (71a-73a) and "difficult" to apply (75a).

As noted (*supra*, p. 7), although the Court of Appeals found error prejudicial to Kodak only in the damage aspects of the film and paper claims, it reversed and remanded for a new trial on liability as well as damages (75a).

REASONS FOR GRANTING THE WRIT

I. Supreme Court guidance is urgently required so that the lower courts may know whether the avulsive changes in § 2 jurisprudence here applied by the Second Circuit should henceforth be applied in lieu of traditional standards which other circuits are following.

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966), this Court's most recent opinion on § 2 of the Sherman Act, confirmed that the national policy embodied in that statute reflects a condemnation of the evils of persistent monopoly power and makes the possession of such power unlawful unless attributable solely to practices devoid of exclusion-

ary purposes or effects.[27] *Grinnell* was an affirmation of *Alcoa*,[28] which, along with *United Shoe Machinery*, continues to be the essential statement of the standards by which conduct related to the acquisition or maintenance of monopoly power is to be tested.[29] The District Judge applied these principles in the charge to the jury (108a) in a manner which was "if anything, more lenient toward Kodak than the stringent rule of *Alcoa*" (111a). Recently, the Ninth Circuit in *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); the District Court and the Third Circuit in *SmithKline Corp.* v. *Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D.Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); the Seventh Circuit in *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); and the F.T.C. in *Borden, Inc.*, 3 Trade Reg. Rep. ¶21,490 at 21,504 (FTC 1978) reaffirmed these principles.

In setting aside the camera verdicts and exculpating a persistent[30] monopoly which was convincingly shown to be the product of deliberately exclusionary conduct, the Second Circuit has ignored the purpose or intent of acts which

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[27] *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 n. 14 (1962); *United States* v. *Griffith*, 334 U.S. 100 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) (quoting at length from *Alcoa* and endorsing its essential teachings, 328 U.S. at 813); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"); *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to relief*, 384 U.S. 563 (1966); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[28] L. Sullivan, *Handbook of the Law of Antitrust* 97 (1977).

[29] L. Sullivan, *supra* at 95.

[30] The January 1979 Report of the National Commission for Review of Antitrust Laws and Procedures observes (p. 156) that it is appropriate to presume that the possessor of persistent monopoly power has violated § 2.

enhanced Kodak's monopoly power, despite *Grinnell's* prohibition of "willfully secured or maintained monopoly power,"[31] and its own condemnation of monopoly power as "inherently evil" (17a) and unlawful if "coupled with the purpose or intent to exercise that power" (21a). It concluded that the *Grinnell* opinion had *sub silentio* abandoned *Alcoa's* "thrust upon" formulation (19a),[32] and elsewhere dismissed this seminal antitrust opinion as a "litigant's wishing well" (18a). Clearly, the Second Circuit acted in conflict with the well-recognized rule that § 2 liability does not depend upon proof of any unlawful or predatory conduct or act. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 498-99 (1968); *American Tobacco Co.* v. *United States, supra* at 809; *Greyhound Computer Corp.* v. *IBM Corp., supra* at 498; *United States* v. *United Shoe Machinery Corp., supra* at 345, where liability was predicated on conduct whose lawfulness had already been upheld, *see* 110 F. Supp. at 348 and *Hanover Shoe, supra* at 500.[33]

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[31] The importance of intent in antitrust litigation was again emphasized in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978), a § 1 case; *Sargent-Welch Scientific Co.* v. *Ventron Corp., supra* at 712, and *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976), recent § 2 cases.

[32] But see *Grinnell, supra,* 384 U.S. at 576 n. 7, where this Court explicitly declined to reach Judge Wyzanski's parallel position that the plaintiff's burden of proving monopolization is satisfied by a showing of persistent monopoly power.

[33] When, without the citation of authority, the Court of Appeals distinguished the exclusionary joint introduction of products by a monopolist from a *per se* illegal tie-in because of the absence of "coercion" (49a-50a), it also contravened the explicit holding of the Third Circuit in *SmithKline Corp.* v. *Eli Lilly & Co., supra,* 575 F.2d at 1061 n. 3; *see also* Austin, *The Individual Coercion Doctrine in Tie-Ins Analysis: Confusing and Irrelevant,* 65 Cal. L. Rev. 1143, 1176-80 (1977); Note, *Innovation Competition: Beyond Telex* v. *IBM,* 28 Stan. L. Rev. 285, 296-97 (1976); Comment, *Physical Tie-Ins as Antitrust Violations,* 1975 U. Ill. L. F. 224.

The continuing vitality of *Alcoa, American Tobacco* (and its approval of *Alcoa*), *United Shoe* and *Grinnell* and the application of their principles in *Greyhound, Borden* and the other cases above cited, have thus been squarely brought into question by this opinion. The ability of § 2 of the Sherman Act to deal with monopolization has been severely undermined. The threat to effective § 2 enforcement resulting from the Second Circuit's aberrational result will be particularly acute with respect to unilateral monopolization, as distinct from monopolization involving combination or acquisition, since this Court has heretofore provided so little express guidance on this issue,[34] which is of such critical importance to the further proceedings in this action[35] and numerous other cases of national moment now pending.[36]

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[34] In fact, this case appears to be the first private action tried to a jury so clearly presenting the issue. The question was presented and the paucity of this Court's guidance on the matter was noted in the Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit in *Telex Corp.* v. *IBM Corp.*, Doc. No. 74-1518 at pp. 26-30. That petition was withdrawn prior to a ruling by this Court.

[35] Particularly in the light of the Court of Appeals' determination that culpable conduct must be related to price increments in proving film and paper overcharge damages.

[36] *See GAF Corp.* v. *Eastman Kodak Co.*, 73 Civ. 1893 (S.D.N.Y.); *Pavelle Corp.* v. *Eastman Kodak Co.*, 73 Civ. 4126 (S.D.N.Y.); *Fotomat Corp.* v. *Eastman Kodak Co.*, 78 Civ. 351 (S.D.Cal.); and *Argus, Inc.* v. *Eastman Kodak Co.*, 79 Civ. 4525 (S.D.N.Y.), where further proceedings and jury trials are anticipated following the outcome of this case; *Greyhound Computer Corp* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), remanding for jury trial in a decision which sharply conflicts, in principle at least, with the instant opinion of the Second Circuit; further proceedings, following hung juries after lengthy trials, are anticipated in *ILC Peripherals*

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The conflicts among the leading authorities which the Second Circuit referred to and created, and the important and novel questions regarding § 2 of the Sherman Act which that Court purported to resolve (7a, 14a, 19a, 40a, 71a-73a) by enunciating unprecedented doctrines so inimical to antitrust policy and enforcement, are matters which urgently require immediate consideration by this Court.

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Leasing Corp. v. *IBM Corp.*, 458 F. Supp. 423 (N.D.Cal. 1978) (*"Memorex"*) and *Transamerica Computer Corp.* v. *IBM Corp.*, 73 Civ. 1832 (N.D.Cal.), both involving claims of exclusionary product interface design and introduction to maintain and leverage monopoly power; *California Computer Products, Inc.* v. *IBM Corp.*, 1979-1 Trade Cas. ¶ 62,713 (9th Cir. 1979) involving, among other claims, the asertion that IBM used its main frame computer dominance to make design changes to exclude peripheral equipment manufacturers—rehearing *en banc* of the decision affirming a defendant's directed verdict has been sought and is deemed to be of sufficient moment by the Ninth Circuit to require briefing by the defendant; *SmithKline Corp.* v. *Eli Lilly & Co.*, where the application of the law as to § 2 liability differed radically from that of the Court of Appeals below (427 F. Supp. 1089 [E.D.Pa. 1976], *aff'd*, 575 F.2d 1056 [3d Cir.], *cert. denied*, 439 U.S. 838 [1978]) is currently being tried as to damages; *SCM Corp.* v. *Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978), following a ten-month jury trial was certified by the Second Circuit on May 25, 1979 for interlocutory appeal under 28 U.S.C. § 1292(b), and involves the question of liability for damages resulting from monopoly power willfully acquired or maintained; and compare the amended complaint in *United States* v. *IBM Corp.*, 69 Civ. 200 (S.D.N.Y., filed Jan. 14, 1975), presently on trial and the complaint in *United States* v. *AT&T*, 74 Civ. 1698 (D.D.C., filed Nov. 20, 1974), both involving § 2 charges including allegations of misuse of monopoly power by multiproduct companies. *See also Purex Corp.* v. *Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979), remanding for a jury trial in an opinion which sharply conflicts, in principle at least, with the opinion below as to the lawfulness of the use of the power of a multiproduct company.

II. The Court of Appeals raised important issues as to the roles of a jury and appellate review in complex cases by substituting its view of the facts for that of the jury and failing to assess the evidence as a whole.

In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Ninth Circuit had separately reviewed each of the matters relied on by an antitrust plaintiff and found none, standing alone, sufficient to sustain a finding of violations or injury. This Court reversed and observed that:

> "It is apparent . . . that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 698-99.

See also Ohio-Sealy Mattress Manufacturing Co. v. *Sealy, Inc.*, 585 F.2d 821, 827-28 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1267 (1979), rejecting reliance by defendant on the fact that each of its allegedly improper acts had been held lawful as "missing the mark" since the evidence must be viewed "as a whole"; *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 1979–2 Trade Cas. ¶ 62,770 at 78,418 (1st Cir. 1979); *Purex* v. *Procter & Gamble, supra* at 888; *Phillips* v. *Crown Central Petroleum Corp.*, 1979–2 Trade Cas. ¶ 62,743 at 78,210 (4th Cir. 1979); *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir), *cert. denied*, 385 U.S. 974 (1966); *United States* v. *General Electric Co.*, 82 F. Supp. 753, 817 (D.N.J. 1949).

The Second Circuit's reversal of the § 2 camera claim verdicts because of its perception of the propriety of the acts of Kodak, each considered separately and out of context, plainly conflicts with the foregoing authorities. It is particularly inappropriate in lengthy and complex antitrust litigation where the intricacies of market structure, motive, intent and effect play such important roles and where, as here, the Court of Appeals found no error in the manner in which the trial was conducted before an experienced and able District Judge. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931); *Greyhound Computer Corp.* v. *IBM Corp.*, *supra* at 499. (See p. 13, *supra*).

Such a review of a jury verdict and the appellate court's factual assumptions in conflict with the verdict (see *supra*, pp. 14-15) also violate the Seventh Amendment limitations upon appellate reexamination of a jury verdict, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) and are alone an appropriate circumstance for the granting of certiorari. *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 30, 34-35 (1944).[37] The importance of early resolution of the issues here involved is fortified by the consideration of the roles of jury, trial judge and appellate courts in antitrust and other complex cases, such as was undertaken in *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1979-2 Trade Cas. ¶ 62,753 at 78,341-48 (E.D.Pa. 1979).

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[37] By rejecting the jury verdict, the Court of Appeals also failed to accord the opinions of the District Judge upholding the verdicts the deference due them by virtue of the fact that he "had conducted the original trial and had watched the case . . . unfold from day to day." *United States* v. *Johnson*, 327 U.S. 106, 112 (1946); *see Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 n. 20 (1974).

III. The Court of Appeals has erroneously created rules of *per se* legality under § 2 which conflict with applicable authorities and precluded consideration of less restrictive alternatives.

In no instance has this Court approved the classification of any conduct as *per se* lawful, and not subject to scrutiny by a finder of fact in light of its purposes and effects and all other relevant circumstances. *Cf. Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 and nn. 15 and 16 (1977).[38]

In this case, however, absent an assessment of economic or social effects or detriment, the Court of Appeals has immunized as *per se* legal, conduct associated with product introduction, which, as next below demonstrated, has been recognized to be fraught with anticompetitive potential.

Leveraging by a monopolist in the manufacture of related products

It is firmly established, as the Court of Appeals recognizes (22a-24a), that a firm may not employ its monopoly power in one market to derive a competitive advantage in another market.[39] It was explicitly here found at trial that

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[38] This Court has repeatedly condemned classification of conduct as *per se* unlawful under the Sherman Act in the absence of the most compelling demonstration that it has a pernicious anticompetitive effect and lacks any redeeming virtue. *Broadcast Music Inc.* v. *Columbia Broadcasting System, Inc.*, 99 S.Ct. 1551 (1979); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra* at 49-56; *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

[39] *See, e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927);

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Kodak had deliberately used its film monopoly to the injury of Berkey in the camera and other markets in a manner which Judge Frankel described as "a deliberate, anticompetitive mode of economic warfare rather than unobjectionable competition on the merits" (157a; see also 109a-12a).

The Court of Appeals, however, determined that deliberately exclusionary conduct, involving leveraging associated with simultaneous product introduction by a monopolist and a variety of other means of securing competitive advantages from presence in a variety of markets, is protected from § 2 scrutiny solely by virtue of the "integrated" nature of its business (25a).[40] No authority was cited to support the Court of Appeals' conclusions, and prior decisions preclude insulating such conduct from the analysis made in the trial court as to its purpose and effect.[41]

(footnote continued from preceding page)

SmithKline Corp. v. *Eli Lilly & Co., supra; Sargent-Welch Scientific Co.* v. *Ventron Corp., supra; Greyhound Computer Corp.* v. *IBM Corp., supra; City of Mishawaka, Indiana* v. *American Electric Power Co.*, 465 F. Supp. 1320 (N.D.Ind. 1979).

[40] The Court of Appeals' rejection of an inquiry as to the purpose or effect of the conduct here involved and its broad approval of a firm's enjoyment of the "competitive advantages" of integration cannot be reconciled with its suggestion that it was not adopting a *per se* rule for product introductions by such a firm (46a n.30), particularly when both Kodak and the District Court recognized that the adoption of such a rule was essential for Kodak to prevail (105a-08a). (See also pp. 6-7, *supra.*)

[41] *See Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra* at 57 n. 26; *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 509 (1969); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Purex* v. *Procter & Gamble Co., supra; Sargent-Welch Scientific Co.* v. *Ventron Corp., supra; Greyhound Computer Corp.* v. *IBM Corp. supra; SmithKline Corp.* v. *Eli Lilly & Co., supra; United States* v. *United Shoe Machinery Corp., supra* at 340.

In *United States* v. *Paramount Pictures, Inc., supra,* involving leveraging made possible by integration, this Court stated that the legality of the conduct employing the benefits of integration turned on such factors as the purposes with which it was conceived, the power it created and the attendant intent and effect. Following the teachings of *Alcoa,* the Court stated that such conduct of a vertically integrated enterprise would be unlawful if it encompassed a power to exclude competition and a purpose or intent to do so.

In *Fortner Enterprises, Inc.* v. *United States Steel Corp., supra,* this Court noted that while the advantages of integration alone are not condemned, this power in one market should not be used to exert economic power over other product lines that the company produces no more efficiently than its competitors. *Id.* at 509; *see also United States* v. *United Shoe Machinery Corp., supra* at 340, where the potential for the pernicious exclusion of competition inherent in the integrated monopolist was clearly recognized.[42]

The opinion of the Court of Appeals ignores the particularly apposite admonitions against the use of the

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[42] Commentators observe that integration presents anticompetitive potential and must be judged by no more permissive a standard than the rule of reason. O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 113 (1975); Blair and Kaserman, *Vertical Integration, Tying, and Antitrust Policy,* 68 Am. Econ. Rev. 397, 401 (1978); Kaserman, *Theories of Vertical Integration, Implications for Antitrust Policy,* 23 Antitrust Bull. 483, 507-09 (1978); *see* Kahn, *Standards for Antitrust Policy,* 67 Harv. L. Rev. 28, 44-46, 54 (1953); Levi, *A Two-Level Monopoly Law,* 47 Nw. U. L. Rev. 567, 583-84 (1952). Section 7 of the Clayton Act, of course, also, reflects an awareness of the anticompetitive potential of integration, *see Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962) and *F.T.C.* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967). In *Purex* v. *Procter & Gamble Co., supra,* the Ninth Circuit recently commented upon the anticompetitive potential of certain conduct which was based on being a multiproduct firm.

powers of the integrated monopolist to disadvantage competitors and preclude competition on the merits. *See Fortner, supra,* and *United States* v. *United Shoe, supra*; Comanor, *Vertical Mergers, Market Power and the Antitrust Laws,* 57 Am. Econ. Rev. 254-265 (1967); Caves & Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competitors,* 91 Q.J. Econ. 241, 246-47 (1977).

This Court should determine whether any true social advantages which may be found to inhere in the ability to operate as a multiproduct firm, without the restraints of § 2, and monopolize several separate markets, should outweigh the values reflected in the antitrust laws which have at all prior times mandated inquiry as to the purpose or effect of conduct by an integrated firm under a rule of reason test.

Predisclosure unrelated to technological advances or inventions but essential for preservation of competition

As earlier demonstrated, § 2 precedents require the consideration of all aspects of a monopolist's conduct in determining the lawfulness of its monopoly. Rather than excluding predisclosure from such appropriate consideration, *Response of Carolina, Inc.* v. *Leasco Response, Inc., supra* at 1330, alluded to by the Court of Appeals (41a), would find a violation where predisclosure was withheld and complementary products were shown to have been designed by a monopolist for exclusionary purposes "rather than to achieve some technologically beneficial result." In *Memorex, supra* at 437, the court found it significant that it did not appear that others "cannot compete with IBM" in the absence of predisclosure. Judge Frankel's instruction on predisclosure (A 265-66)—held faulty by the Court of Appeals—framed the very inquiry contemplated by *Memorex* and was, read in context with extensive surrounding caveats, consistent with *Response of Carolina, supra.* Moreover, the concerns expressed in *Memorex* as to the

right to protect technical secrets are not here apposite since the disclosure contemplated in this case did not relate to film technology or any aspect of camera design (*supra*, pp. 11-12).

The authorities which condemn monopolists who deny competitors access to an essential resource, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1 (1945) and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), also establish that it was proper for the jury to have been permitted to consider whether Kodak's decision not to predisclose, in the light of other conduct determined to be anticompetitive, had a similar exclusionary effect.[43]

The manifest propriety of allowing the fact finder to consider whether the monopolist has employed "the least restrictive way of achieving [its] legitimate purpose", III P. Areeda & D. Turner, *Antitrust Law* 75-76 (1978), supports the consideration of predisclosure solely as a means of ameliorating the effects of anticompetitive conduct as was done in the District Court. As a recent law review article observed:

> "Allowing the jury to consider evidence indicating failure to predisclose was appropriate because the lack of predisclosure was merely one factor which established a course of unlawful monopoly conduct. The *Berkey* court's instructions suggest, however, that failure to predisclose by itself is not the type of conduct which infringes section 2." Note, *The Predisclosure Requirement*, 10 Rut.-Cam. L.J. 395, 421 (1979).

See also Comment, *Physical Tie-Ins as Antitrust Violations*, *supra* at 224, 235 (1975); Schwartz, *Berkey-Kodak Verdict No Cause for Panic*, N.Y.L.J., May 1, 1978 at 1.

Accordingly, Judge Frankel's charge on predisclosure and the jury's consideration of the matter were not im-

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[43] *Cf.* relevant portion of Judge Frankel's charge to the jury (A 265-66).

proper or validly the basis for reversal of the § 2 camera claim verdicts and the contrary conclusion of the Court of Appeals, arrived at without meaningful precedential support (40a), should be reviewed so as to avoid confusion on the matter which the opinion below has engendered.

IV. In deciding a question of first impression, the Court of Appeals ruled that, to recover damages, a direct purchaser of overpriced products from a monopolist must relate price movements to specific anticompetitive acts. This requirement is substantively unsound and would procedurally inhibit private damage actions and preclude recovery.

As early in the history of the Sherman Act as 1906, this Court upheld a recovery in a price fixing conspiracy for overcharges by a direct purchaser based on "the difference between the price paid and the market or fair price that the [plaintiff] would have had to pay under natural conditions" holding that "the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful [citation omitted] in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong." *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 396, 397 (1906). In *Thomsen* v. *Cayser,* 243 U.S. 66 (1917), this Court reversed the Second Circuit and reinstated a jury verdict for overcharged customers, rejecting defendants' contention that it was not shown that plaintiffs were injured by the illegal combination. The Court stated:

> "[t]he plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess of over what was reasonable was an element of injury (citation omitted). The unrea-

> sonableness of the rate and to what extent unreasonable was submitted to the jury, and the verdict represented their conclusion." 243 U.S. at 88.

The claim that the jury considered "supposititious profits" was answered by the Court's observation that an admonition was given to the jury against speculation. Compare *Phillips* v. *Crown Central Petroleum Corp., supra* at 78,216, where very recently the Fourth Circuit applied these principles, and observed that in calculating damages the District Court was entitled to use what it perceived to be "the best approximation" of what the price would have been in the absence of the violation.

In *Hanover Shoe Inc.* v. *United Shoe Machinery Corp., supra*, a § 2 case, this Court followed the authorities first above cited (*id.* at 489-90), and upheld the right of a direct purchaser to recover from a monopolist the full amount of an overcharge.[44] The Court noted that "[n]ormally the impact of a single change in the relevant conditions cannot be measured after the fact," and recognized the difficulty of determining the impact of individual events on price movements "in the real economic world rather than an economist's hypothetical models." *Id.* The opinion states that if it were necessary to try to determine such hypothetical economic effects, "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories" (*id.* at 493-94). Seeking to avoid such complexity or the undesirable results of allowing violators to "retain the fruits of their illegality," the Court reversed the judgment of the Court of Appeals to the extent it had set aside the District Court's computation of damages.

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[44] Judge Frankel also believed that price fixing principles and authorities were here controlling (see 129a-133a).

In *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 724-25 (1977), this Court restated the last mentioned concerns expressed in *Hanover Shoe;* quoted at length from the discussion in *Hanover Shoe* as to the unproductive burdens inherent in attempting to explain a company's pricing policy (*id.* at 725 n. 3); and cautioned against "the costs to the judicial system and the efficient enforcement of the antitrust laws" (*id.* at 732) of a rule which embroiled a trial in such an economic morass.

The above authorities reflect the fundamental tenet that private treble damage actions play a vital and salutary role in antitrust enforcement and should be encouraged. *See, e.g., Illinois Brick, supra* at 745 and pp. 35-36 *infra.* As stated in *Radovich* v. *NFL,* 352 U.S. 445, 454 (1957), the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws."

Trial and appellate courts alike have been enjoined by this Court to:

> ". . . observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the

plaintiffs.' " *Zenith* v. *Hazeltine, supra,* 395 U.S. at 123-24.

Accordingly, any uncertainty as to the amount of damages is to be resolved against the wrongdoer. *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-65 (1946). *See also Story Parchment Co.* v. *Paterson Parchment Paper Co., supra; Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1927).

Although no prior decision has considered the method of quantifying damages of a direct purchaser from a monopolist, the rule of damages applied in the District Court for determining the film and paper overcharges is wholly in accord with the foregoing authorities. It was, as previously demonstrated (*supra,* p. 18), based on all relevant proof required to show the difference between the prices which would have prevailed in the absence of monopolization and the unconscionably high prices defendant was able to exact as a result of the wrongs which § 2 interdicted—*i.e.,* monopolization—the illegally obtained or maintained power to fix or establish prices. All proffered proof and argument which would permit the jury to assess the extent to which defendant's price premium derived from legitimate factors were received and the jury was specifically instructed to exclude from its award any element of Kodak's pricing attributable to lawful or permissible circumstances.[45]

The rule enunciated by the Court of Appeals would, on the other hand, base the damage award not on the inter-

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[45] At the prices for Kodak film and paper which would have prevailed in the absence of Kodak's monopolization of the markets, as reflected in the jury damage awards, Kodak's earnings on sales or return on investment would still have been in the extraordinarily high 30-40 percent range for film and 40-50 percent range for paper.

dicted, improperly acquired power to fix prices, but on individual acts, despite the fact that as that Court observed, § 2 is "aimed primarily not at improper conduct, but a pernicious market structure" (16a). Additionally, this formulation entails the staggering[46] tasks of proving and identifying all of the forces that influence the monopolist's pricing[47] and the individual effects of each, despite this Court's recognition that it cannot be done and should not be attempted.

CONCLUSION

The result below can only serve to undermine the private enforcement of the antitrust laws which this Court has declared to be essential to the preservation of competition. *Reiter* v. *Sonotone Corp.*, 99 S.Ct. 2326 (1979); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). Significantly, it was specifically because of a perceived threat to

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[46] The Court of Appeals observed (75a): "It may, of course, be difficult for a purchaser to demonstrate that conduct occurring many years before the commencement of suit contributed to an overcharge that it paid within the limitations period."

[47] If the views of the Court of Appeals prevail, it would behoove plaintiffs to prove all manner of a defendant's conduct, including that which is otherwise lawful or remote, that questionably was exclusionary, and it would be necessary for the trier of fact to determine each such claim. On the other hand, a comprehensive review of other conduct of defendant and competitors would presumably also be required to weigh the relative importance and quantitative significance of the exclusionary conduct. As a consequence, actions of this kind, which are now uncomfortably long, would be further extended.

"the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" that certiorari was granted in *Perma Life, supra* at 136.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

ALVIN M. STEIN
530 Fifth Avenue
New York, New York 10036
Attorney for Petitioner

Of Counsel:

BARRY J. BRETT
MARK I. SCHLESINGER
AURORA CASSIRER
MARK D. OFFEN

PARKER CHAPIN FLATTAU & KLIMPL
NEUMAN, WILLIAMS, ANDERSON & OLSON

TABLE 1

CAMERAS

The following are Kodak's camera sales, market shares, and profit data as set forth in the record:

Year	*Market Share* *Units %*	*$ %*	*Rate of Earnings from Operations to Sales %*	*Return on Investment %* *126*	*110*	*Sales $(000)*
1954	61	64				10,800
1955	67	69				12,200
1956	71	70				12,500
1957	66	73	16.8			15,000
1958	67	69	9.3			12,200
1959	69	75	16.8			16,000
1960	72	78	5.7			13,500
1961	65	77	15.7			13,800
1962	61	75	23.4			15,200
1963	65	85	26.0			25,500
1964	71	90	38.4			42,200
1965	80	87	44.6			50,600
1966	74	82	57.0			65,700
1967	71	75	49.1			68,500
1968	72	74	45.6			70,600
1969	73	75	44.7	74.4		71,600
1970	65	70	36.7	49.4		60,900
1971	70	72	42.0	72.2		67,100
1972	69	77	42.5	93.6	67.0	114,200
1973	74	79	44.2	85.6	92.3	141,900
1974	67	N.A.	40.7	59.1	55.0	102,000
1975	63	N.A.	36.5	46.2	41.3	
1976	53	N.A.				
SOURCE	E 1185	E 1185	C 213	C 214	C 214	E 1183

TABLE 2

FILM

The following are Kodak's film sales, market shares, and profit data as set forth in the record:

Year	*Market Share* *Units %*	*\$ %*	*Rate of Earnings from Operations to Sales %*	*Return on Investment %*	*Sales \$(000)*	*Earnings \$(000)*
1952	83	89				
1953	86	92			76,912	
1954	86	91			75,063	
1955	84	91			82,387	
1956	84	91			96,221	
1957	85	92			104,609	
1958	86	93			114,570	
1959	86	94			125,215	
1960	86	92			126,569	
1961	83	91			126,982	
1962	82	88			126,705	
1963	82	88			120,277	
1964	82	88	47.1	58.0	138,010	65,083
1965	85	90	51.6	64.9	167,479	86,466
1966	88	92	54.0	71.4	187,311	101,138
1967	91	93	55.0	71.6	222,817	122,450
1968	90	92	57.6	71.5	241,740	139,358
1969	89	92	56.3	64.9	246,413	138,597
1970	87	89	55.7	61.7	260,453	144,984
1971	87	89	59.4	63.5	269,826	160,281
1972	88	90	57.9	68.1	304,618	176,432
1973	87		55.6	63.3	317,419	176,456
1974	87		55.5	67.2	346,072	192,019
1975	86		56.3	66.7	383,613	216,080
1976			59.2		436,806	258,745
SOURCE	E 1286	E 1287	C 210	C 236-37	C 210	C 210

TABLE 3

COLOR PAPER

The following are Kodak's color paper sales, market shares, and profit data as set forth in the record:

Year	*Market Share* *Units %*	*$ %*	*Rate of Earnings from Operations to Sales %*	*Return on Investment %*	*Sales $(000)*	*Earnings $(000)*
1955			Neg.		14	—615
1956			—69.7		1,036	—722
1957			8.7		4,623	404
1958	85		28.1		8,993	2,529
1959	95		39.9		14,022	5,595
1960	95		40.9		16,450	6,727
1961	97		45.9		20,017	9,184
1962	99		52.9		23,601	12,494
1963	94		54.4		28,132	15,309
1964	97		55.1	49.6	35,812	19,739
1965	95		56.5	53.3	44,188	24,962
1966	98	100	57.6	58.1	57,923	33,378
1967	98	96	57.6	58.1	77,054	44,403
1968	94	94	58.9	59.9	98,772	58,181
1969	91	92	61.1	59.4	113,843	69,560
1970	91	91	60.7	55.2	123,592	74,984
1971	89	89	61.0	57.0	137,331	83,815
1972	86	87	63.0	66.0	164,576	103,723
1973	85	87	60.7	63.3	176,202	106,910
1974	76	78	58.3	68.4	190,146	110,949
1975	67	69	58.1	68.7	190,209	110,494
1976	60					
SOURCE	E 1289	E 1288	C 211	C 236-37	C 211	C 211

While the table indicates sales by others in the 1958-1966 period, it was clear that up to 1966 Kodak faced no cognizable competition and was generally considered to be the sole source of color print paper (A 796-97; E 1977).